

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
A La Carte and Themed Programming	)	MB Docket No. 04-207
and Pricing Options for Programming	)	
Distribution on Cable Television and	)	
Direct Broadcast Satellite Systems	)	

**REPLY COMMENTS OF  
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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Introduction and Summary .....	1
I. Overwhelmingly, Commenters Understand that À La Carte Requirements Would Result in Higher Costs, Fewer Viewing Options and Less Program Diversity.....	3
II. À La Carte Proponents Offer No Business Plan or Model that Suggests, in Contrast to the Booz Allen Study, that À La Carte Would do Anything but Make Almost All Consumers Worse Off.....	12
III. Nothing About the Canadian À La Carte Experience Suggests that À La Carte Would be Viable or Good For Consumers in the United States. ....	17
IV. The Analog Technology Used to Offer Per-Channel Services During the Era of Cable Rate Regulation Would not be a Practical or Cost-Effective Way to Provide À La Carte Today.....	19
V. Prohibiting Program Networks From Negotiating Tier Carriage Would not Serve the Public Interest. ....	21
Conclusion .....	23

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The National Cable & Telecommunications Association (“NCTA”) hereby submits its reply comments in the above-captioned proceeding.

**INTRODUCTION AND SUMMARY**

No commenter in favor of à la carte has submitted any economic evidence to demonstrate that à la carte pricing, or à la carte pricing in combination with expanded basic service tiers, offers a viable business model for multichannel video programming distributors or program networks. Nor does any proponent of à la carte offer any evidence that counters what NCTA showed in its comments –namely, that à la carte would negatively impact programming diversity, and lead to increased marketing and operating costs that would result in higher bills for virtually all cable customers.

The comprehensive study by Booz Allen Hamilton, submitted by NCTA, demonstrates that the imposition of à la carte or themed tier requirements would make most cable customers worse off. Customers who opted to purchase more than six program networks on an à la carte basis would pay more than they now pay for basic and expanded basic tiers. Even customers who chose to continue purchasing currently existing tiers – if that were an option – would see

their bills increase by from 7% to as much as 15%. Meanwhile, a substantial number of new and emerging networks would be likely to fail, and even established networks would have strong incentives to merge in order to remain profitable under an à la carte regime.

Most commenting parties recognize that this would be the case and oppose à la carte requirements. The proponents of à la carte – a much smaller number – generally base their support on the erroneous proposition that à la carte options will enable customers to reduce their cable bills by purchasing only those services that they want to watch. But once it is understood that, as the Booz Allen report shows, customers will pay more than they currently pay to watch less than they currently watch – and that the number and diversity of available programming will be diminished – the proponents’ arguments melt away.

Some commenting parties point to the à la carte offerings in Canada as a model for what should be required to be offered by cable systems in the United States. But as NCTA showed in its initial comments, most Canadian systems that offer à la carte options limit those options to digital cable networks – while all the most popular and widely viewed networks remain available only as part of the large analog basic and expanded basic tiers. The only exceptions are some systems in Quebec, where most of those (English-language) services have little viewership and derive minimal advertising revenues in any case, and where most of the (French-speaking) households purchase the complete analog tiers. This anomalous situation can hardly serve as a model for à la carte in the United States.

While even most proponents of à la carte agree that, as a practical matter, only digital services can be offered on an à la carte basis, some parties suggest that cable systems could deploy analog technology in order to make à la carte offerings available. It would, however, make no economic sense, at a time when cable operators have made massive investments in

digital capabilities, to invest in interdiction, addressable analog descramblers, or other analog technologies of the past.

Finally, some parties argue that even if cable operators are not required to provide services on an à la carte basis, cable networks should be barred from negotiating contractual provisions that prohibit such à la carte offerings. But, as the Booz Allen report shows, some cable networks' business plans and viability may depend on their being placed on widely purchased tiers. They may need the certainty of such tier placement in order to invest in programming. Prohibiting them, across the board, from negotiating for such certainty would raise the costs and undermine the marketplace development of programming that cable operators are willing to carry.

**I. OVERWHELMINGLY, COMMENTERS UNDERSTAND THAT À LA CARTE REQUIREMENTS WOULD RESULT IN HIGHER COSTS, FEWER VIEWING OPTIONS AND LESS PROGRAM DIVERSITY.**

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A large number of commenting parties did not need the Booz Allen study to understand the implications and likely effects of an à la carte regime. A multitude of cable operators and program networks, as well as the largest direct broadcast satellite (DBS) provider, recognized that à la carte would drive up the per-subscriber cost of programming, while imposing costs of additional equipment, additional bandwidth, and customer care on operators – all of which would result in higher prices, reduced program quality and less diversity of programming for their customers.

Hundreds have chosen to file *in opposition to* à la carte from many social and economic perspectives. The list is impressive:

A&E TV Network  
Advance/Newhouse Comm.  
African American Women in Cinema  
Alexis Bailey

Allanza Dominicana  
Allbritton Communications Co.  
Alliance for Community Media  
Altitude Sports & Entertainment, et al

American Business Women's Assoc  
American Cable Assoc.  
American Women in Radio & TV  
Andrea Plummer

Arab American Institute  
 Audobon Partnership for Economic Dev.  
 AZ State Rep. Gallardo  
 Bloomberg Television  
 Bronx Borough President Adolfo Carrion  
 Brooklyn Enterprise Center  
 Brotherhood Crusade  
 CapAnalysis et al  
 Carolina Christian Broadcasting  
 Cato Institute  
 Center for Advancement of Women  
 Center for Creative Voices in Media  
 Charter Communications  
 Chicago South Side NAACP, et al  
 Christian Faith Broadcasting  
 Church Ladies for Choice  
 City Year  
 Comcast Corporation  
 Cmty Assoc. of Progressive Dominicans  
 Congressman Edolphus Towns  
 Congressman Grijalva  
 Congresswoman Loretta Sanchez  
 Count Me In  
 Court TV  
 Crown Media United States  
 C-SPAN Networks  
 CT Communications Network  
 CT State Comptroller  
 Cuban American National Council  
 DirecTV Group  
 Discovery Communications  
 Dr. William Crews-The Awakening Hour  
 Dream TV & Paradise Radio Networks  
 Eternal World Television Network, Inc.  
 Faith & Family Broadcasters Coalition  
 Feminist Majority  
 FL State Rep Bob Henriquez  
 Fox Cable Networks  
 Girls Inc. of NYC  
 Global Fund for Women  
 GoodLife TV Network  
 GSN  
 Hispanic Federation  
 Hon. Guillermo Linares  
 IL State Senator Iris Martinez  
 Insight Communications  
 Internat'l Cable Channels Partnership  
 Ken Mikesell  
 Labor Council for Latin American Adv.  
 LATv Holdings  
 Leadership Conference on Civil Rights

League of United Latin American Citizens  
 Legal Momentum  
 LeSEA Broadcasting Corp.  
 Lifetime Entertainment Services  
 Lower Eastside Girls Club of NY  
 Marion Scott Realty  
 Mayor of Hartford, CT  
 Mayor of Inglewood, CA  
 Mayor of Jackson MI  
 Mayor of Richwood, LA  
 Mayor of Robbins, IL  
 Mayor of St Gabriel, LA  
 Mayor of Stamford, CT  
 MBC Gospel Network  
 MGTV  
 Mind On the Media  
 MJB Strategies  
 Motion Picture Association of America  
 Mount Hope Housing Company  
 Ms. Foundation for Women, Inc.  
 Mt. Hood Cable Regulatory Commission  
 NALEO Education Fund  
 Nat'l Asian Pacific Am. Legal Consortium  
 Nat'l Assoc. of Public Affairs Networks  
 Nat'l Black Chamber of Commerce  
 Nat'l Black MBA Association  
 National Cable & Telecom. Assoc.  
 National Conference of Black Mayors  
 Nat'l Conf. of Black Mayors, LA Chapter  
 National Conf. of Democratic Mayors  
 National Council of Women's Orgs  
 National Hispanic Policy Institute  
 Nat'l Prtnshp for Women & Families  
 National Pol. Cong. of Black Women  
 National Urban League  
 NBC Universal  
 NJ Board of Public Utilities  
 NY Assemblyman Ruben Diaz  
 NY State Assemblyman Benjamin  
 NY State Assemblyman Boyland  
 NY State Assemblyman Diaz  
 NY State Assemblyman Espaillat  
 NY State Assemblyman Heastie  
 NY State Assemblyman Perry  
 NY State Assemblyman Towns  
 NY State Assemblywoman Cook  
 NY State Assemblywoman Greene  
 NY State Senator Andrews  
 NY State Senator Parker  
 NY State Senator Smith  
 NY Women in Communications, Inc

NY Women in Film & TV  
 NYC Cncl Black, Hisp. & Asian Caucus  
 NYC Council Member Baez  
 NYC Council Member Boyland  
 NYC Council Member Fidler  
 NYC Council Member Lopez  
 NYC Council Member Serrano  
 NYC Councilman Barron  
 NYC Councilman Comrie  
 NYC Councilwoman Katz  
 Oxygen Media Corp  
 Paul Miller  
 Planned Parenthood of NYC  
 Professional & Collegiate Sports  
 Progress & Freedom Foundation  
 Public Affairs Access  
 Rainbow/PUSH Coalition  
 Ralph Howard  
 Reach Media  
 Religious Voices in Broadcasting  
 Sallie Jackson-Asghar  
 Scripps Network  
 Sexuality Info. & Education Council  
 Sister to Sister  
 Smaller Operators  
 S. Asian Women's Leadership Forum  
 Southern CA HIV Advcy Coalition  
 Starz Encore  
 StepUp  
 TelAlaska, Inc.  
 The America Channel  
 The Women's Alliance  
 Time Warner Cable  
 Turner Broadcasting System  
 TV One  
 Univision Comm  
 Viacom  
 Victory Television Network  
 Walt Disney Company  
 Warm Spirit  
 Weather Channel  
 White House Project  
 William C Vasquez Institute  
 William King  
 Women in Cable & Telecom.  
 Women of Value in Every Nation  
 Women's Sports Foundation  
 Women's Venture Fund  
 Woodhull Institute

Several of these parties have augmented the findings of the Booz Allen report with additional economic studies demonstrating the benefits of tiering and the adverse effects of mandatory unbundling. For example, Comcast, Disney, Viacom, Discovery Communications, Fox Cable Networks, and TV One all submitted economic analyses that confirmed the detrimental effects that an à la carte requirement would have on consumers.<sup>1</sup>

In addition, an overwhelming number of commenting parties who have no business interest in the production and distribution of video programming but who have an interest in the quality and diversity of available programming recognized the serious threat that à la carte would pose to that interest. As these parties noted, à la carte requirements would diminish the variety of niche programming available to viewers. In particular, as a coalition of prominent religious broadcasters including Pat Robertson (The Christian Broadcasting Network), Jerry Falwell (Old Time Gospel Hour), Paul Crouch (Trinity Broadcasting Network), Robert Sutton (FamilyNet TV), and Garth Coonce (Tri-State Christian TV) pointed out: “The viewpoints offered to society from the religious, minority and ethnic communities also face the danger of being silenced by the imposition of an *a la carte* regime.”<sup>2</sup>

Here is a sampling of what the numerous proponents of program diversity said:

- “Mandating an *a la carte* system for cable would represent an **enormous step backward** in the fight for greater diversity and cross-cultural understanding.” *Congresswoman Linda Sanchez-CA.*

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<sup>1</sup> See Katz, Michael L., “Slicing and Dicing: A Realistic Examination of Regulating Cable Programming Tier Structures” attached to Comments of Comcast Corporation; Bauman, Michael G. and Mikkelsen, Kent W., “Benefits of Bundling and Costs of Unbundling Cable Networks” attached to Comments of Walt Disney Company; Owen, Bruce M. and John M. Gale, “Cable Networks: Bundling, Unbundling, and the Cost of Intervention” attached to Comments of Viacom; Declaration of Robert D. Willig, Johnathan M. Orszag, and Jay Ezrielev Regarding A La Carte Pricing, attached to Comments of Discovery Communications, Incorporated; Statement of Gustavo Bamberger attached to Comments of Fox Cable Networks Group; and Declaration of Larry D. Gerbrandt attached to Supplemental Comments of TVOne.

<sup>2</sup> Comments of the Faith and Family Broadcasting Coalition at 11.

- “Its enactment would **undermine the progress** our country has made in diversifying its television programming.” *Steve Gallardo, Arizona House of Representatives.*
- “...many opinion leaders have called on media businesses to generate more channels to serve audiences of African-American’s, Hispanics, Asians, and other ethnic groups. **The imposition of an a la carte pricing model could bring these efforts to a screeching halt.**” *Reverend Jesse L. Jackson, Sr., Rainbow/PUSH Coalition.*
- “A la carte **directly challenges years of growth and expansion of diverse programming** in today’s media marketplace.” *Marc H. Morial, National Urban League.*
- “To best preserve the values of the First Amendment, Faith & Family Broadcasters urge the FCC to report to Congress that **a la carte** or themed tier programming **would have a profoundly adverse impact on the current pricing and availability of diverse programming.**” *Faith and Family Broadcasting Coalition (Pat Robertson, Jerry Falwell, Paul Crouch, Robert Sutton, and Garth Coonce).*
- “We are concerned that the proposals for mandatory government requirements of ‘a la carte’ cable pricing result in higher consumer prices, fewer consumer choices, a **reduction of diversity**, a **reduction in the amount of family-friendly programming**, and a **reduction in jobs and investment in a currently thriving industry.**” *Chairman Jim Miller, CapAnalysis, LLC.*
- “[T]he ‘a la carte’ system would block the ability for cable companies to share various cultural ideas and styles in their programming. Consequently, the **minority representation** on television will be **eliminated or strongly decreased.**” *Gabriela Lemus, League of United Latin American Citizens.*
- “With its multi-channel universe, cable provides **a wealth of diverse resources** allowing viewers the ability to share other cultures, communities, styles and viewpoints. The imposition of a la carte would drastically reduce, if not **eliminate entirely**, that opportunity.” *Dr. C. DeLores Tucker, National Congress of Black Women, Inc.*
- “Its implementation will result in higher prices and ultimately **the demise of ethnic, foreign-language and specialty channels** that are vital to our cable system and to the American public.” *Guarione M. Diaz, Cuban American National Council, Inc.*
- “By any conceivable statistical measure, **citizens today have access to more video outlets and options than at any time in history.** And the industry has invested tens of billions in infrastructure upgrades to provide continuous service improvements and line-of-business expansions. This is a great capitalist



success story not to be taken lightly or casually disposed of by regulatory fiat.”  
*Adam D. Thierer, Cato Institute.*

- “An *a la carte* system would **silence minority voices**, and deplete the programming marketplace of a valuable source of diverse viewpoints and experiences.” *Barry A Friedman, LATV Holdings, Inc.*
  - “We depend on a wide variety of audiences to help support our charity work . . . If an ‘*a la carte*’ system were put in place **it would be more difficult to help our community.**” *Dr. James Thompson, Carolina Christian Broadcasting, Inc.*
- “We hope that you do not overlook the **terrible consequences** *a la carte* would have **on Christian broadcasting** and that you rule and recommend against *a la carte*.” *Rusty Yost, Christian Faith Broadcasting.*
  - “. . . [A *la carte*] **would undermine existing multicultural networks**, erect a substantial barrier to entry for new networks, and erode media diversity.” *Elizabeth A. Meixell, Church Ladies for Choice.*
- “LCCR believes that the **troubling impact on diversity** must move to the center of the commission’s analysis of a cable *a la carte* and that it must therefore caution Congress regarding its impact on diversity as it considers its adoption.” *Wade Henderson, Executive Director, Leadership Conference on Civil Rights.*
  - “Various populations rely on cable to provide a window into **other cultures, communities, styles and viewpoints.** The imposition of a *a la carte* **would drastically reduce, if not eliminate** that opportunity entirely.” *Mayor Douglas Palmer, National Conference of Democratic Mayors.*
- “Recent efforts in Congress to impose an ‘*a la carte*’ regime on the cable industry would put a **halt to the further growth and development of minority-oriented, niche program networks.**” *N. Nick Perry, Member of New York Assembly.*
  - “The **consumer is unlikely to select the new network in a *a la carte*,** since the consumer is not yet familiar with the new network, and instead will select the legacy network.” *Doron Gorshein, President and CEO, The America Channel, LLC.*
- “These **new channels have been able to thrive because of how cable operators introduce them** into their program line-up.” *Iris Y. Martinez, Illinois State Senator.*

- “**Less popular channels will not survive.** But those are the channels I watch most. So I will end up being forced to watch what the majority of (uneducated) Americans choose to watch!” *William R. King.*
- “It would be unfortunate if a proposal which intended to give consumers more choice and control were to **inadvertently reduce diversity** in programming and with it the number of women and minority owners, executives and employees in the cable industry.” *Nicole Wild, The Women’s Alliance.*
- “‘A la carte’ regulation could **directly threaten community access** to C-SPAN channels and state public affairs networks, such as the California Channel, which MVPDs now carry to many communities on basic tiers as a public service.” *Paul V. Miller, Public Affairs Access.*
- “MGTV is one of many state public affairs networks in the U.S. that are supported and distributed by cable television. Forcing an *a la carte* model on the cable and satellite industries could **effectively silence our voices.**” *William C. Trevarthen, Executive Director, Michigan Government Television.*
- “...the channels that appeal to more specialized audiences, particularly ethnic, foreign-languages and niche programming, would have trouble attracting enough subscribers to survive. Ultimately, this situation would result in generic and low quality programming aimed at the majority. **The minority voice would be silenced** in the ‘a la carte’ system.” *Jose M. Serrano, Council Member, New York City Council.*
- “For far too long, minority groups had little programming that portrayed their communities in a positive light or programming that reflected their life experiences. The recent increases in cable channel capacity have added channels that now more adequately reflect the diversity of America. These new channels have been able to thrive because of how cable operators introduce them into their program line-up . . . In an ‘a la carte world,’ where viewers pay separately for each channel, they are **unlikely to spend their money on a new channel they know little about.**” *Maria Baez, Member, New York City Council.*
- “Given that the ‘a la carte’ alternative would trump the bundling system and concomitantly **affect relative diversity in programming,** I am respectfully asking you to treat it with the most exacting scrutiny.” *Malcolm Smith, New York State Senator.*
- “Its implementation would **reduce or eliminate programming aimed at minority groups.**” *Congressman Edolphus “Ed” Towns (NY).*

- “[I]t **does not benefit consumers.**” . . . “An impressive and vibrant cable programming industry has developed without the need of government regulation. Cable offers consumers an incredible entertainment and educational value. Please help sustain this system and do not support the ‘a la carte’ proposal.” *Nancy Wyman, Comptroller, State of Connecticut.*
- “If cable and satellite companies sell channels a la carte, it would **instantly erode potential advertising support**, forcing networks that serve **minority investments** to dramatically increase the per-subscriber fee charged.” *Harvey Johnson, Jr.*
- “Each day I have the opportunity to see some of the very best and brightest stars in the Dominican community – they approach my organization with dreams of business ownership and the resolve to see them through . . . That is why I write to express my concern regarding the issue of *a la carte* pricing for cable television, which **would most certainly reduce**, rather than expand, **the diversity of programming on cable television.**” *Walther Delgado, Audubon Partnership for Economic Development LDC.*
- “I implore you to **reject the ‘a la carte’ system. Help keep diverse programming on the air.** For the sake of the continued success that is our pluralist nation.” *Margarita Lopez, Member, New York City Council.*
- “It is my belief that if this system is implemented it would **reduce or eliminate programming aimed at minority groups.**” *Tracy L. Boyland, Member, New York City Council.*
- “The expanded universe of cable and satellite television enables a wide range of programming to develop, targeting all segments of the population. However, these networks and programs were only able to grow because they were included [in] the basic tier of channels. The **a la carte proposal seems concerned** only with pricing and **not with the diversity** that has flourished on cable and satellite networks.” *Harry C. Alford, National Black Chamber of Commerce.*
- “It would **adversely affect the ability of our community to freely express themselves through valuable cultural programs** that draw on our collective heritage, and promote the visual & dramatic arts, film, theater, literature, music. For example, in places such as Los Angeles County, over forty percent of the Asian households speak English less than very well. Without programming, particularly news programs, in language, these households would be further isolated.” *Karen K. Narasaki, National Asian Pacific American Legal Consortium.*
- “The fact that the cable and satellite industries, like other network industries with very large up-front costs and low marginal costs, employ tiering (or bundling) in offering services does not mean that the marketplace is not competitive and that consumers are not being well served. It simply means that such **tiered pricing is the most**

**economically efficient way to offer service** to the benefit of all consumers. **It leads to a greater diversity of programming at lower prices.**" *Thomas M. Lenard, The Progress and Freedom Foundation.*

- "With over three million Arab-Americans currently residing in the United States, networks such as LBC, ART, Abu Dhabi, MBC, Al Arabiyah and al Jazeera offer programs aimed at Arab-American audiences – news, talk, entertainment, and sports in Arabic and other languages. Not only are these programs a source of information and entertainment, **continued diversity in programming is critically important** at a time when portraits of Arab-Americans and Arabs generally are painted with such a broad brush. **For many, cable television is the only window into different cultures, languages, and styles.**" *James Zogby, Arab American Institute.*
- "As a HIV Advocacy Advocate, I rely on local cable shows and public access programming to help spread the word on what is happening with the epidemic. Limited programming will limit our access to educating the public, further limiting our efforts. Please do not support 'a la carte.' The 100,000 people living with HIV in Southern California are counting on you." *Alberto B. Mendoza, Southern California HIV Advocacy Coalition.*
- "Quality programming with African-American role models is an invaluable tool for teaching both members of our community and others who are not often exposed to different cultures. Diversity on television also provides more opportunities for minority actors and those who work on these programs. We therefore urge you to support policies that promote the continue diversity of voices on cable television and **oppose cable a la carte proposals that jeopardize this diversity.**" *Reverend James L. Demus III, Chicago South Side NAACP.*
- "On the surface, this idea sounds appealing, but a deeper look can only lead to the conclusion that a la carte packaging would have a **chilling effect on programming diversity in America.**" *Oscar Joyner, Reach Media.*
- "I believe its implementation will result in higher prices and ultimately, **the demise of ethnic, foreign language and specialty channels** that are to vital to our cable system and to the American public." *Edward L. Harris, Mayor, Town of Richwood, LA.*
- "Clearly **there is a need for more – not less – programming aimed at Latinos** as well as an environment in which struggling networks that provide quality programming can find a voice." *Antonio Gonzalez, President, William C. Velasquez Institute.*
- "I fear that an 'a la carte' system would affect residents who enjoy specialty programming aimed at ethnic diversity by making those channels financially inaccessible or by driving those channels from the cable market. In short it

would deprive a large portion of our community from taking advantage of diverse programming on cable television.” *Eddie A. Perez, Mayor, City of Hartford, CT.*

- “As ‘niche’ networks (who nonetheless provide an invaluable service to their viewers), our members are very likely to lose subscribers and/or positions in channels lineups if an a la carte model is enforced. **Loss of these networks would deny the residents of their states an important conduit to the democratic proceedings of their respective state governments.**” *Paul Giguere, President, The National Association of Public Affairs Networks.*
- “Its enactment would **undermine the progress** our country has made in diversifying its television programming.” *Michael A. Benjamin, State Assembly of New York.*
- “After many years without a voice, channels such as BET, Telemundo, and Bronxnet were created to give not only these minority groups a voice, but our borough as a whole. In addition, other networks such as Oxygen, WE (Women’s Entertainment), have been forged to combat women’s issues. Channels such as these and the issues that they address help to save lives and educate our community. Due to recent increases in cable channel capacity, there are now more channels that reflect how diverse our nation truly is. By proposing to eliminate these multicultural and gender outlets, **you would be attempting to eliminate the patchwork that has made America the nation that it is today.**” *Aurelia Greene, State Assembly of New York.*
- “This ‘a la carte’ cable system approach would **reduce or eliminate programming aimed at minority groups.**” *Adolfo Carrion, Jr., Office of the Bronx Borough President.*
- “Without an adequate number of subscriptions, revenue would decline, the cost of subscription would increase and **specialty channels would consequently be put out of business.**” *George L. Grace, Sr., Mayor, City of St. Gabriel, LA.*
- “**The minority voice would be silenced** in the ‘a la carte’ system.” *Maurice A. Brown, Louisiana Chapter, National Conference of Black Mayors.*
- “This poorly thought out proposal will **seriously undermine the progress our country has made in diversifying its television programming** and I urge your strong opposition.” *Michael J. Bustamante, MJB Strategies.*
- “Channels with *niche* audiences will find it difficult to attract new viewers, as their principal method of advertising – the remote control – is ripped

**from their hands.** Instead, they will be forced to market using other means – and convince viewers to pay extra for the privilege.” *Hiram Monserrate, Member, New York City Council.*

- “Contributions from these non-core viewers are often accompanied by letters describing how EWTN’s programming touched or affected the viewer or provided guidance in a time of need. **In an a la carte world, EWTN’s ability to reach out and touch such non-core viewers will be drastically curtailed.** No one will benefit.” *Howard J. Barr, Counsel to Eternal World Television Network.*

## **II. À LA CARTE PROPONENTS OFFER NO BUSINESS PLAN OR MODEL THAT SUGGESTS, IN CONTRAST TO THE BOOZ ALLEN STUDY, THAT À LA CARTE WOULD DO ANYTHING BUT MAKE ALMOST ALL CONSUMERS WORSE OFF.**

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The comments of proponents of à la carte requirements are substantially smaller in number – and lighter in substance – than the opponents. Most of them simply claim that consumers want and would benefit from the opportunity to pay less in order to purchase only those services that they want to watch. The marketplace suggests, to the contrary, that consumers have benefited from the opportunity to sample and occasionally watch programming other than those that they view heavily. As cable operators have continued to add services to their tiers, the number of hours that households spend watching cable program networks has steadily and sharply increased – *and more than half of this increase is attributable to newly added networks.*<sup>3</sup>

The City of Seattle’s Office of Cable Communications (“OCC”) offers survey results purporting to show that “a high percentage of the population wants choice and would be willing to pay for the ability to customize their channel selection” – *but only if this meant that their cable bills went down*: “This is not to say. . . .that consumers would be willing to pay a higher total package cost for their cable services. The OCC believes that giving subscribers the

opportunity to customize their own packages would actually lower the overall cost of their cable service.”<sup>4</sup>

It’s not surprising that a majority of survey respondents said they’d be happy to have greater choice if the result was a lower cable bill. But, as last year’s report by the General Accounting Office indicated, and the Booz Allen report confirms, the core assumption of the Seattle OCC and other à la carte proponents is erroneous. Households that chose to purchase less than the entire existing tiers would *not* pay proportionately less than they pay today. In most cases, they would pay significantly *more*. And the à la carte proponents offer nothing that suggests, much less demonstrates, otherwise.

The only “study” submitted in support of à la carte is a paper submitted by Consumers Union and Consumer Federation of America purporting to show that tiering, as is currently offered by virtually all cable *and* DBS systems, is nothing but an anticompetitive abuse of monopoly power that extracts higher prices from customers. Putting aside the monumental factual problems with this argument – the Commission has recognized, for example, that consumers throughout the nation can choose from among at least three vigorously competing providers of comparable cable and DBS services<sup>5</sup> – the economic underpinnings are also severely flawed.

First of all, even if cable operators *were* the only sellers of multichannel video programming in their service areas, they could not increase their profits by forcing customers to buy something that they do not value. Any customer who buys a bundle that includes products

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<sup>3</sup> Booz Allen Hamilton, “The a la carte Paradox: Higher Consumer Costs and Reduced Programming Diversity” (“Booz Allen”) attached to Comments of the National Cable and Telecommunications Association at 15.

<sup>4</sup> Comments of the City of Seattle, Department of Information Technology, Office of Cable Communications at 2.

<sup>5</sup> *Tenth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 04-5, rel. Jan. 28, 2004.

that he or she does not want or value would also be willing to pay – and the cable operator could charge – the very same price for just the products that he or she *does* want. Indeed, if the cable operator incurred additional costs by offering the additional, supposedly worthless services, its profits would be *diminished*.

Thus, as former FCC Chief Economist Michael Katz confirms, in a paper submitted by Comcast Corporation, “[t]here is no logical or factual basis for claiming that tiers force people to pay for programming they don’t want.” There must be another explanation for not selling services on an à la carte basis, and Professor Katz explains what it is: “[O]nce one takes into account the effects on the supply of programming available to cable and DBS operators, economic analysis shows that the use of tiers can lead to situations in which *every* consumer *pays less* and *receives more* programming than he or she would under *à la carte* pricing.”

This point was driven home at the symposium that the Commission recently held in conjunction with this proceeding. The Commission invited four independent economists to discuss à la carte issues. All four appeared to agree that bundling tended to increase consumer welfare and that à la carte regulation would likely make consumers worse off.

For example, Professor David Waterman stated that

[t]he overall effect of a mandatory à la carte system would really be *pretty disastrous*. I think, first of all, it would have a very negative effect on the advertising market because advertisers would no longer have very much demand to reach small audiences. Networks would be more dependent on their affiliate fees, but they can’t just raise their affiliate fees. They’ve already raised them. They would refocus their programs to try to appeal to intense groups, so programming content would change.<sup>6</sup>

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<sup>6</sup> (Emphasis added.) The statements of the four economists cited herein are transcribed from the video recording of the symposium, archived on the Commission’s website.



Thus, according to Professor Waterman, “anything that you do to try to force à la carte and less bundling, almost everything you do, has some kind of negative effect, which I think is probably going to swamp other things.”

Professor Steven Wildman agreed: “Is it possible to improve over the current situation [with some sort of à la carte regulation]? . . . Off the top of my head, I can’t think of any way.” Professor Wildman agreed that when consumers purchase tiers of program networks “you aren’t paying for something you don’t want,” although something you don’t want may be in the same tier. He explained that “bundling is a way to effectively price discriminate” in a beneficial way that “tends to promote efficiency.” Such an approach “tends to increase welfare and is a good thing.”

Professor Gregory Crawford provided similar economic explanations, noting, for example, that “there are certainly discriminatory reasons for cable systems to bundle, and this may actually enhance the quality and number of cable networks that we see.”

Professor Erik Brynjolfsson elaborated on why this is so in the case of cable television, where the marginal cost of providing cable networks to additional subscribers is very low, even though bundling may be less beneficial when there are higher marginal costs:

When a good has close to zero marginal cost, the economically efficient thing from an economy-wide standpoint is to make it available to everybody who has it at value greater than zero. So, to the extent that some people are priced out of the market by a positive price, that is a detriment to social welfare. And that tends to happen to a greater extent when things are priced à la carte than when priced as a bundle.

Professor Brynjolfsson also confirmed the effects of à la carte requirements on program diversity:

Disproportionately hurt are the small not widely watched content channels. When you go to à la carte, their subscriptions and revenues fall disproportionately. Conversely, when you add them as part of the bundle, they’re the ones that

benefit the most. So, going to à la carte is going to disproportionately reduce the amount of product variety and obscure channels or viewpoints that are available as compared to bundles.

Once these fundamental economic facts are understood, there's not much left to the arguments of Consumers Union and Consumer Federation, or the other proponents of à la carte. None of these parties provides a business model or economic analysis that explains how requiring the provision of services on an à la carte basis would enable consumers to pay less to watch the programming they want. None provides a model or analysis that explains how à la carte would somehow result in more diverse programming or greater opportunities for independent and minority-owned businesses.

As the comments of a group of rural telephone companies point out, “[w]hen all is said and done, the real measure of the impact [of à la carte] on consumer rates is whether the subscribers’ total monthly bills go up, down or stay the same once they take only the services they actually watch.”<sup>7</sup> These commenting parties, like most of the proponents of à la carte, think that, of course, monthly bills will go down. But the Booz Allen report shows that this is just wishful thinking. For virtually all subscribers, monthly bills will go *up*.<sup>8</sup>

Other commenting parties, like the Center for Creative Voices in Media, engage in similar wishful thinking when they suggest that à la carte will increase diversity in the programming marketplace. As discussed above, the Booz Allen study shows that, as the economists at the Commission’s symposium confirmed and as numerous commenting parties have recognized, à la carte would *reduce* program diversity – both diversity of formats *and*

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<sup>7</sup> Comments of CT Communications, Inc. et al. at 14.

<sup>8</sup> Booz Allen at 1.

diversity of ownership. It shows, first, that “[a]s many as half to three-quarters of emerging networks could fail . . . , including a growing number of targeted niche and ethnic program networks, and new network launches would become extremely unlikely.”<sup>9</sup> It also shows that even established networks would incur significant expenses and losses in viewership and advertising revenues, “which would likely lead to *further industry consolidation into fewer network groups*.”<sup>10</sup>

### **III. NOTHING ABOUT THE CANADIAN À LA CARTE EXPERIENCE SUGGESTS THAT À LA CARTE WOULD BE VIABLE OR GOOD FOR CONSUMERS IN THE UNITED STATES.**

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Some à la carte proponents suggest that because Canadian cable operators are offering some à la carte options to their customers, there is no reason to think that consumers in the United States would not benefit from the same options. NCTA, in its initial comments, identified key facts about the Canadian à la carte experience, which explained why that experience could not be imported as a model for cable systems in this country. None of the commenting parties come to grips with those distinguishing facts.

First of all, while Consumers Union and Consumer Federation argue that “all channels beyond the basic tier” should be unbundled and offered on an à la carte basis, they concede that only *digital* customers can be offered services on an à la carte basis. They also concede that “the large majority of cable households purchase *analog* [and] it might not be feasible in the next few years to offer à la carte to those consumers.” But they suggest that current *digital* customers could “instantly” be offered à la carte access to all currently tiered services beyond the basic broadcast tier.<sup>11</sup>

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<sup>9</sup> Booz Allen at 2.

<sup>10</sup> *Id.*

<sup>11</sup> Comments of Consumer Union and Consumer Federation of America at 8.

As we discussed in our initial comments, that's not the case. To offer services to customers on an à la carte basis, it's not only necessary that the customers be equipped with digital set-top boxes but also that the services being offered are transmitted digitally. So, unless all the cable networks offered on existing analog tiers – the networks that the proponents of à la carte are most eager to have available on an à la carte basis – were switched to (or duplicated on) digital tiers, they could not be made available à la carte, even to digital customers. It's only services on the digital tiers that can be offered à la carte in a technologically feasible way.

This is no less true in Canada. In most cases, Canadian cable customers cannot purchase services on the basic and expanded basic analog tiers on an à la carte basis. Only digital tier services, with little viewership, minimal advertising – and, so far, minimal profits – are available à la carte. The marketing of marginal digital services in this manner has little or no effect on the core analog tier offerings that Canadian cable customers spend most of their time watching.

The exceptions are certain cable systems in Quebec, which have duplicated all their analog program offerings on digital channels so that it is technically feasible to offer all channels à la carte. Subscribers to these systems are still required by Canadian regulations to purchase a basic tier that includes “must-carry” broadcast channels and cable networks. But the other widely viewed core services that are offered on analog tiers in the rest of Canada are also available on an à la carte or themed tier basis.

On the other hand, as we noted in our initial comments, most of these services are English-language services, while most Quebec households speak French. What this means is that the effect of à la carte availability in Quebec on these services is fairly minimal, since they do not depend on Quebec for significant viewership and advertising revenues. At the same time, the effect of à la carte availability on the more limited number of French-language cable

networks is also fairly minimal because almost all French-speaking cable households choose to purchase virtually all of these networks by buying the entire analog tier without opting for à la carte.<sup>12</sup>

For these reasons, the Canadian à la carte offerings provide no basis for concluding that à la carte – particularly the Quebec model that Consumers Union and Consumer Federation describe as “the kind of system that we envision for the United States” – would be feasible and viable in this country. There is no place in Canada where the full array of networks currently available on analog tiers is being offered on an à la carte basis except Quebec, where the anomalies of bilingualism blunt the economic effects on program networks.

**IV. THE ANALOG TECHNOLOGY USED TO OFFER PER-CHANNEL SERVICES DURING THE ERA OF CABLE RATE REGULATION WOULD NOT BE A PRACTICAL OR COST-EFFECTIVE WAY TO PROVIDE À LA CARTE TODAY.**

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The National Association of Telecommunications Officers and Advisors (NATOA) argues that the fact that some cable systems offered programming on an à la carte basis during the era of cable rate regulation in the early 1990’s shows that, in fact, “there are no technological barriers” to such an approach.<sup>13</sup> In fact, it shows nothing of the sort. First of all, most of these systems made only a small number of their expanded basic tiered services available on a per-channel basis, so that they were able to use physical traps to make them available in the same à la carte manner as premium movie channels.

Those systems that offered most or all of their tiered services available on an à la carte basis typically used “interdiction.” This technology entailed the installation of equipment outside a customer’s home that would electronically allow access to only those analog channels

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<sup>12</sup> See NCTA Comments at 33–35.

<sup>13</sup> Comments of NATOA at 4.

that a customer chose to purchase. The alternative to interdiction was to use addressable analog set-top boxes. But that approach, unlike interdiction, would have required that all analog channels be “scrambled,” and that all cable customers – even those with cable-ready sets who purchased no premium movie channels – use a set-top box to unscramble and receive their programming.

Neither approach was particularly widespread because, as NATOA points out, it made little economic sense for anyone to purchase services at the à la carte prices at which they were available. Tiered and packaged services were offered à la carte because this exempted the packages and tiers that included them from the stringent and artificial constraints of the FCC’s rate regulation rules – not because à la carte was viewed as an optimal or desirable way to meet the marketplace demands of cable customers.

In any event, while technologies may still exist for making analog services available on an à la carte basis – and, as the comments of Blonder Tongue Laboratories, et al. indicate, interdiction technology *is* still available as a method of providing per-channel access to analog channels<sup>14</sup> – this does not mean that the use of such technologies would be a practical or cost-effective way to offer such services today. After an investment of tens of billions of dollars to make cable systems digital-ready, virtually all new technology and new services deployed by cable operators are digital. It would make no sense today to invest in and deploy yesterday’s analog technologies, such as addressable analog set-top descramblers or interdiction equipment.

This is why Booz Allen concluded, based on its experience in the industry and its discussions with cable operators, that if operators were to make currently tiered services available on an à la carte or themed tier basis, they would do so by duplicating the services on

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<sup>14</sup> Joint Comments of Blonder Tongue Laboratories, Inc, et al.

digital channels. Analog technologies exist, to be sure. But those technologies would be less efficient

and ultimately more costly than duplicating services digitally – making consumers even worse off and making à la carte an even less economically viable option.

**V. PROHIBITING PROGRAM NETWORKS FROM NEGOTIATING TIER CARRIAGE WOULD NOT SERVE THE PUBLIC INTEREST.**

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Some commenting parties argue that while cable operators should not be *required* to offer programming on an à la carte basis, they should have the *option* to do so voluntarily. They would therefore prohibit cable program networks from negotiating contractual provisions that require that their programming be carried on basic or expanded basic tiers and prohibit operators from offering the programming on an à la carte basis.

While some parties call this a “voluntary” à la carte approach, there is, of course, nothing “voluntary” about such governmental restrictions on the terms and conditions of marketplace negotiations. The business models – and, in some cases, the economic viability – of program networks depend upon the manner in which they are provided to cable customers. As the Booz Allen report explains, a program network that is offered on an à la carte basis can expect to have fewer viewers, greater marketing expenses and less advertising revenue than would be the case if the same network were offered on basic or enhanced basic tiers. This means that a greater portion of the network’s revenues must be derived from affiliate fees paid by cable operators – and, ultimately, by customers.

For some program networks – particularly, premium channels whose format consists of movies and original programming uninterrupted by advertising – this trade-off may be viable and desirable. But for others, it may not work at all. As Booz Allen points out, “Program networks’ ability to raise license fees to offset higher marketing expenses and lost advertising is limited by

the amount that customers are willing to pay for such networks. . . .”<sup>15</sup> There may not be a price point at which the network will be purchased by a sufficient number of customers to cover the network’s costs. If that were the case, the program network would have to alter its plans and format, reducing expenditures and diminishing the quality of its programming – which could, in turn, further reduce viewership and advertising revenues.

If a program network’s business plan and viability depend on being carried on a widely distributed tier, it may need to be able to negotiate for the right to such carriage from its cable operator affiliates before committing to significant programming expenditures. A governmental restriction on the ability to negotiate for such assurance would simply thwart the ability of the network to provide programming that the marketplace might otherwise support. As the joint comments of several program networks has explained, such a restriction

would result in niche networks losing the ability to control their distribution destiny and hence the stability of their business plans. To offset the loss in distribution and revenue that would inevitably result from a “voluntary” à la carte mandate, niche networks would be required to alter their content and format to increase distribution on those MVPD systems where they are offered à la carte while at the same time maintaining the content and format that successfully serves their niche audiences on those MVPD systems where they are carried on widely distributed tiers. This places niche networks in the untenable position of trying to please everyone and pleasing no one at all.<sup>16</sup>

The proponents of a prohibition on tier carriage requirements in affiliation agreements fail to recognize the wholly legitimate and pro-competitive reasons why a program network might seek binding commitments to be carried on the basic or expanded basic tier. They suggest that, in all cases where such requirements are agreed to, cable operators are being forced by

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<sup>15</sup> Booz Allen at 2.

<sup>16</sup> Joint Comments of Altitude Sports & Entertainment et al. at iv. *See also* Comments of The Hallmark Channel at 9-10 ([I]n addition to the uncertainty and variability inherent in ratings, programmers will have month-to-month variations in subscribership – in contrast to their broadcast network competitors which will have government-



program networks to accept a result that makes consumers worse off by making them pay for services that they do not want or value. But, as a general rule,

[t]he distribution chain for video programming is not ‘broken.’ On the contrary, dynamic competitive forces have allowed MVPDs and niche networks to negotiate mutually-beneficial distribution agreements that enable niche networks to produce diverse, high-quality programming that MVPDs can distribute to the public at affordable prices without government intervention.<sup>17</sup>

It may, of course, be the case that in particular negotiations between operators and program networks, one side or the other may believe that its counterpart has and is unfairly exploiting undue leverage. But the line between hard bargaining in a competitive marketplace (which generally promotes efficiency and consumer welfare) and exploitation of market power (which may raise prices and artificially restrict what is available to consumers) is not always objectively discerned by the negotiating parties. In light of the legitimate interests that program networks have in the manner in which their service is carried, there is no reason to presume that *every* contractual restriction on tier placement is harmful to consumers and should be prohibited.

### **CONCLUSION**

For the foregoing reasons, and for the reasons set forth in NCTA’s initial comments, there is no reason to suspect that government intervention to require or induce cable operators to offer services on an à la carte or themed tier basis will do anything but make consumers worse off. Cable customers would end up paying more to receive fewer and less diverse viewing options. None of the proponents of à la carte have offered any evidence, economic analysis or business models that show otherwise. Moreover, none of the proponents even addresses the First

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mandated universal distribution. Thus, as one example, the level of predictability necessary for the ‘up front’ advertising market will be difficult if not impossible to achieve.”)

<sup>17</sup> Joint Comments of Altitude Sports & Entertainment et al., *supra*, at 64.

Amendment implications of such an à la carte requirement, much less counters the showing in NCTA's initial comments that such a requirement would be unconstitutional.

Accordingly, the Commission should report that à la carte regulation not only is at odds with the First Amendment but would be likely in any event to harm, not benefit, consumers.

Respectfully submitted,

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